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DISTRIBUTION ALTERNATIVES, INC., dba DSS

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13

14 In Re:

15 BETTA PRODUCTS, INC.,

16 Debtor,

17 BETTA PRODUCTS, INC.,

18 Plaintiff,

19 v.

20 DISTRIBUTION SYSTEMS AND SERVICES,
21 INC., aka DSS,

22 Defendant.
23
24

Case No.: C-07-02661 VRW

Chapter 11 Bankruptcy Case No.: 03-10925
Adversary Proceeding No.: 05-01046

**APPELLEE'S MEMORANDUM IN
OPPOSITION TO APPELLANTS'
MOTION TO DISMISS APPEAL
WITHOUT PREJUDICE**

The Honorable Vaughn R. Walker

25 **I. INTRODUCTION**

26 Appellee, Distribution Systems and Services, Inc. ("DSS") opposes the motion of
27 Appellants, Betta Products, Inc. ("Betta") and the Betta Products, Inc. Litigation Trustee
28

1 (“Trustee”) to dismiss their appeal without prejudice because the motion asks this Court to issue
 2 an order which effectively gives Betta and the Trustee an open ended, unconditional right to
 3 reinstitute their appeal at any time. DSS has no objection to dismissal of the appeal. However, it
 4 respectfully submits that the dismissal must be with prejudice to reinstate, since the judgment
 5 appealed from was final. It decided all the issues and claims in a case severed under Rule 21, and
 6 it was entered in conformity with 9 U.S.C. §13.

7 II. ARGUMENT

8 Betta and the Trustee offer as their sole arguments for dismissal that (1) they need to focus
 9 their efforts on the pre-trial and trial preparations of another, separate case and that (2) DSS will
 10 suffer no prejudice because the arguments and research it prepared in this appeal were duplicated
 11 in motions before the bankruptcy court in that separate case. *See* Appellants’ Memorandum in
 12 Support of Motion to Dismiss Appeal Without Prejudice at 2-3.

13 Their first argument, implying that this appeal will take away from their focus on that
 14 other, separate case, is disingenuous at best, since this appeal is fully briefed and requires no oral
 15 argument. They now have all the time they want to focus on that other case.

16 Their second argument is wrong as a matter of law. Dismissal without prejudice would
 17 cause DSS irreparable harm by depriving it of the finality to which it is entitled, and leave it open
 18 to a future appeal at any time, at Betta and the Trustee’s sole discretion.¹ Moreover, Betta’s and
 19 the Trustee’s motion totally ignores that fact that the judgment from which they appealed was
 20 final, and they have not offered this Court any legal authority why it should dismiss without
 21 prejudice to reinstate. Since the judgment was final, dismissal should be with prejudice.

22 The bankruptcy court severed this case in October, 2006, in accordance with Rule 21 so
 23 that it could proceed separately from the remaining case. The October severance order, which
 24 appears at Betta’s and the Trustee’s Appendix at ER pg. 168 *et seq.*, reflected a complete
 25 understanding of the effect of such a severance:

26 [t]he claims added in the Amended Complaint are severed from the
 27 contract claims pursuant to Fed. R. Civ. P. 21, as incorporated into

28 ¹ Betta and the Trustee, on the other hand, have shown no prejudice to their interests by having
 their appeal decided now, because there is no such prejudice.

1 bankruptcy cases by Fed. R. Bankr. R. 7021, and *the actions will proceed*
 2 *separately*. (emphasis added.)

3 *Id.* at 2. That statement correctly reflects the legal effect of the severance—cases severed under
 4 Rule 21 proceed separately. See FED. R. CIV. P. 21 (stating that “[a]ny claim against a party may
 5 be severed and proceeded with separately.”) Because once severed, the two cases proceeded
 6 separately, any judgment entered in this case became final, as the bankruptcy court appeared to
 7 understand when, following its Rule 21 severance of the two cases, it ordered judgment to be
 8 entered and then entered judgment in this case in conformity with 9 U.S.C. §13. *See* order for
 9 judgment (ER pg. 1051) at 2, and judgment (ER pg. 1049) at 2; *see also, e.g.*, 7 Charles Alan
 10 Wright, Arthur R. Miller, and Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE §1689
 11 (2001) (stating that once a case has been severed under Rule 21 “it proceeds as a discrete unit
 12 with its own final judgment. . .”) (citations omitted); *see also* 4 Moore’s FEDERAL PRACTICE
 13 §21.06 (3d Ed. 2007).

14 Severance under Rule 21 results in separate actions. A single claim that is
 15 severed from a multicclaim action ‘may be . . . proceeded with separately. In
 16 other words, the severed claim proceeds as a discrete, independent suit. It
 17 and the original case result in their own separate final judgments. . . While
 18 judgment on a severed claim is final for purposes of appeal, judgment on a
 19 claim tried separately [under Rule 42(b)] is not an appealable final
 20 judgment, unless certified under Rule 54.

21 *Id.*

22 Moore points out that this interpretation of Rule 21 is followed in the cases in virtually all
 23 the circuits and that there does not appear to be any opposition to it in any of the other circuits.
 24 *See id.*; *see also* 7 Wright at §1689.

25 Granting Betta’s and the Trustee’s motion to dismiss without prejudice could require
 26 duplication in a later appeal of the efforts already expended in this appeal and it will deprive DSS
 27 of the final judgment which it earned in this case. The Bankruptcy Court not only ordered the
 28 cases to proceed separately but it specifically invoked Rule 21 in severing the cases so they could
 proceed separately. *See* October, 20, 2006, severance order, ER pg. 169. Therefore, the judgment
 in Betta I was final and appealable, and any dismissal of the appeal from that judgment should be

1 with prejudice to reinstate just as if it had not been taken to begin with. *See, e.g.*, FED. R. CIV. P.
2 21; 4 Moore's FEDERAL PRACTICE §21.06; 7 Wright, FEDERAL PRACTICE AND PROCEDURE §1689.

3
4 **III. CONCLUSION**

5 The judgment from which Betta and the Trustee appealed was undeniably entered in a
6 case severed under Rule 21. That judgment was final. Betta and the Trustee may dismiss the
7 appeal from that judgment, but if they do so their right to appeal terminates and may not be
8 reinstated.

9 Dated: September 19, 2007.

ABBEY, WEITZENBERG, WARREN & EMERY

10 By: 

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PROOF OF SERVICE
[Code Civ. Proc. § 1013(a)]

I am employed in the County of Sonoma, California.

I am over the age of eighteen (18) years and not a party to the within cause; my business address is 100 Stony Point Road, Suite 200, Santa Rosa, California 95401.

On the date set out below, I served the attached:

APPELLEE'S MEMORANDUM IN OPPOSITION TO
APPELLANTS' MOTION TO DISMISS APPEAL WITHOUT PREJUDICE

on the interested parties in said cause, by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Daren R. Brinkman, Esq.
 Laura J. Protillo, Esq.
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Counsel for Plaintiff
 Betta Products, Inc.

XX (BY MAIL) I placed each such sealed envelope, with postage thereon fully prepaid for first-class mail, for collection and mailing at Santa Rosa, California, following ordinary business practices. I am readily familiar with the practice of Abbey, Weitzenberg, Warren & Emery for the processing of correspondence, said practice being that in the ordinary course of business, correspondence is deposited with the United States Postal Service the same day as it is placed for processing.

_____ (BY OVERNIGHT MAIL) I placed each such sealed envelope, with postage thereon fully prepaid for overnight mail, for collection and mailing at Santa Rosa, California, following ordinary business practices. I am readily familiar with the practice of Abbey, Weitzenberg, Warren & Emery for the processing of correspondence, said practice being that in the ordinary course of business, correspondence is deposited with the overnight mail provider the same day as it is placed for processing.

_____ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the addressee(s) noted above.

_____ (BY FACSIMILE) I caused said document to be transmitted by facsimile machine to the number indicated after the address(es) noted above.

_____ (BY ELECTRONIC TRANSMISSION) I caused said document to be transmitted electronically to the email addresses indicated after the address(es) noted above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on September 19, 2007, in Santa Rosa, California.


 Barbara S. Himbert